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No. 96-8986

Supreme Court, U.S.
FILED
FEB 23 1998
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Confronted with three statutes whose language can only plausibly be read to confer jurisdiction on the Court, amicus makes a valiant effort to pretend that their "[p]lain [t]erms" (Am. Br. 15) actually preclude jurisdiction. But the broad terms of 28 U.S.C. §§ 1254(1) and 1651 unmistakably grant this Court power to review all judicial proceedings in the courts of appeals and to enter all appropriate orders to protect its own appellate jurisdiction; and 28 U.S.C. § 2253 by its clear terms restricts only "appeal[s] * * * *to the court of appeals*," not certiorari in this Court. Lacking any persuasive argument grounded in the language of Section 2253, amicus urges this Court to "imply" restrictions on its certiorari jurisdiction for policy reasons and based on novel reconstructions of legislative history and precedents. As we show below, however, no justification exists for curtailing the generous discretionary certiorari power Congress has granted.

I. SECTION 2253 DOES NOT STRIP THIS COURT OF CERTIORARI JURISDICTION

Although amicus maintains that the statutory certiorari provision and the All Writs Act do not confer jurisdiction in this case, those arguments rest almost entirely on his claim that Section 2253 erects a statutory barrier. As we next explain, that argument defies the language, structure and purpose of Section 2253.

A. The "Plain Terms" of Section 2253 Do Not Mention, Let Alone Proscribe, This Court's Certiorari Jurisdiction

Repeatedly and emphatically in his brief, amicus describes Section 2253 as an "'express statutory provision[]'" (Am. Br. 13)[1] that by its "[p]lain" (*id.* at 15), "unmistakabl[e]" (*id.* at 11), "unbending" (*id.* at 16), "unequivocal[]" (*ibid.*), and "unyielding" terms (*id.* at 11), "prohibit[s]" this Court's certiorari jurisdiction (*ibid.*). When the rhetoric is swept aside, however, one fact is clear: *no* language in that provision even obliquely alludes to, let alone "express[ly]" eliminates, this Court's certiorari power. Even the States that have filed in support of amicus are constrained to admit this point. States Br. 7 n.2 (conceding a "lack of specific language in section 2253 regarding [certiorari] jurisdiction").

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[1] "U.S. Br." refers to the Solicitor General's opening brief; "U.S. Reply" refers to the Solicitor General's reply brief; "Am. Br." refers to appointed counsel's brief; "Br." refers to Hohn's opening brief; and "States Br." refers to the several States' amicus brief.

Unable to detect in Section 2253 any language prohibiting certiorari review, amicus endeavors to insert some. He contends that Section 2253, which by its terms restricts access only to "appeal[s] * * * to the court of appeals," "erects a jurisdictional gate to *appellate review* of all failed habeas petitions." Am. Br. 16 (emphasis added). By substituting the broader term "appellate review" for the more limited statutory phrase "appeal * * * to the court of appeals," amicus strives to expand the certificate provision to foreclose review by writ of certiorari, which is an exercise of the Court's "appellate jurisdiction." See *Felker* v. *Turpin*, 116 S. Ct. 2333, 2342 n.1 (1996) (Souter, Stevens & Breyer, JJ., concurring).[2] But that sleight of hand is precluded by Congress's clear limitation of the certificate requirement to "an *appeal* * * * *to the court of appeals*." 28 U.S.C. § 2253(c) (emphasis added). While review on certiorari is an exercise of this Court's appellate jurisdiction, it is *not* "an *appeal* * * * *to the court of appeals*" — which is the only proceeding to which Section 2253 restricts access. By selecting those limiting words, Congress evinced its intent to leave this Court's certiorari jurisdiction intact.

That Congress's failure to refer to this Court's certiorari jurisdiction in Section 2253 signifies its intent to retain certiorari jurisdiction is confirmed by an examination of other statutory language in the AEDPA. As we have explained (Br. 35-36), Congress proscribed such jurisdiction explicitly in Section 2244(b)(3)(E):

> [t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable *and shall not be the subject of a petition* for rehearing or *for a writ of certiorari.*

28 U.S.C. § 2244(b)(3)(E) (emphasis added). The highlighted language, which has no counterpart in Section 2253, demonstrates both (1) that Congress says so explicitly when it wishes to preclude this Court's review on certiorari, and (2) that Congress was aware that a restriction on "appeals" alone is insufficient to rescind the certiorari jurisdiction this Court otherwise has to review decisions disallowing appeals.

[2] Amicus similarly seems to ascribe (at 17, 24) great significance to Congress's use of the term "certificate of *appealability*." But the term "appealability" cannot reasonably be interpreted to encompass this Court's review on a writ of certiorari, which is not an appeal.

B. Amicus's Efforts To Explain Away The Contrast Between Sections 2253 And 2244 Are Unsuccessful

Amicus wisely concedes (at 26) that Congress's different treatment of the gatekeeping decisions in Sections 2244 and 2253 was intentional. Unwilling to accept that the different terms mean exactly what they say (*i.e.*, that there is a jurisdictional bar to certiorari only in Section 2244 and not in Section 2253), however, amicus proffers (at 26) the contra-textual "double-knot" theory to justify reading the different terms to mean the same thing. The "double-knot" theory is that Congress prohibited this Court's certiorari review of gatekeeping decisions in Section 2244 merely *to emphasize* what Congress understood was the rule even without an express prohibition — that certiorari review of gatekeeping decisions is never available. In contrast, amicus contends (at 26 (emphasis added)), "Congress had little reason to worry about *confirming* that certiorari was precluded" over Section 2253 gatekeeping decisions because "*House* [v. *Mayo*, 324 U.S. 42 (1945) had] already establish[ed] the point."

The "double-knot" theory amounts to little more than a plea to this Court to interpret Section 2244(b)(3)(E) of the AEDPA as unnecessary surplusage. That argument contravenes the established principle of statutory construction that statutes should not be read to render provisions superfluous. See, *e.g.*, *Dunn* v. *CFTC*, 117 S. Ct. 913, 917 (1997); *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 698 (1995).[3] Amicus's theory also rests on a distortion of the holding in *House*. Although *House* held that statutory certiorari is unavailable, it also held that common-law certiorari jurisdiction to review gatekeeping decisions *is* available. See *House*, 324 U.S. at 44-45. Amicus's assertion (at 26) that "*House* [had] already establish[ed] the point" that "certiorari was precluded" therefore tells only half the story.

Finally, Congress amended Sections 2244 and 2253 in 1996 against the background of not only *House*, but also a half-century of this Court's consistent practice of granting writs of certiorari to review denials of

[3] Amicus's attempt (at 26) to justify the superfluity his interpretation of the AEDPA would create falls flat: while it is true that Section 2244 contains "a hurdle to any district court consideration at all," Section 2253 similarly contains "a hurdle to any" *court of appeals* "consideration at all." The difference in forum simply has no bearing on whether there is a need for a clear statement in both contexts to prohibit certiorari jurisdiction over the court of appeals' gatekeeping decision.

leave to appeal. U.S. Br. 24 nn. 13-14 (collecting examples). Although during that half century two dissents were filed arguing against certiorari jurisdiction (*Jeffries* v. *Barksdale*, 453 U.S. 914 (1981) (Rehnquist, J., Burger, C.J., & Powell, J., dissenting); *Davis* v. *Jacobs*, 454 U.S. 911, 916-919 (1981) (Rehnquist, J., Burger, C.J., & Powell, J., dissenting)), that hardly sufficed to give Congress "little reason to worry about confirming that certiorari was precluded" as amicus contends (at 26). Amicus's efforts to explain away the contrast between Sections 2253 and 2244 are thus unpersuasive.

C. There Is No Basis For "Implying" A Ban On Certiorari

Finding no support in the language of the AEDPA, amicus resorts to arguing that a ban on certiorari jurisdiction should be read into Section 2253 by implication. But the Court ought not reach those arguments because the language of Section 2253, which restricts only the right to take "an appeal * * * *to the court of appeals*," is clear. Even if Section 2253 were ambiguous, however, amicus's various reasons for inferring a prohibition against certiorari jurisdiction are unpersuasive, especially in view of the principle that "[r]epeals [of appellate jurisdiction] by implication are not favored." *Felker*, 116 S. Ct. at 2338.[4]

1. A Ban Cannot Be Inferred From The Mere Existence Of An Alternative Remedy

Amicus claims that "no rational explanation exists for" Congress's decision both to permit the Court to review "the court of appeals' certificate decision by certiorari" (at 18) and to authorize Justices of the Court to decide original applications for certificates of appealability.

[4] Amicus argues (at 14-15) that Article III vests Congress with power to eliminate the Court's certiorari jurisdiction over gatekeeping decisions. But petitioner has asserted (Br. 39-40 & n.30) only that the Court's practice of avoiding such constitutional questions is yet another reason to interpret Section 2253 consistently with its plain language. Three Justices recognized only last Term that the question whether the AEDPA exceeds Congress's Exceptions Clause power might arise if the courts of appeals "adopted divergent interpretations of the gatekeeper standard" and this Court were precluded from resolving the conflict. See *Felker*, 116 S. Ct. at 2342 (Souter, Stevens & Breyer, JJ., concurring). As we explain in our opening brief (at 30-31) and below at pp. 5-6, the ability of Circuit Justices to grant certificates is a wholly inadequate means of reviewing and resolving circuit conflicts regarding gatekeeping decisions.

Accordingly, he urges, the grant of power to the Justices to issue certificates necessarily implies a revocation of the power to issue writs of certiorari.

Amicus's argument that the creation of one avenue of relief implies the elimination of another rests on the erroneous premise that there is something questionable, or even unusual, about duplicative or overlapping remedies. In fact, Congress creates overlapping avenues for relief all the time, and has done so especially in the context of habeas corpus, which is itself a collateral remedy.[5] Amicus's argument also proves too much. If the creation of one avenue of relief implies the elimination of all others, then Congress's enactment of Section 2253 also must signify retraction of the Court's power to grant an original petition for habeas corpus. Yet amicus concedes (at 14) that Section 2253 does not accomplish that result. Why should Congress's silence in Section 2253 concerning this Court's jurisdiction be interpreted as a statutory bar to one jurisdictional venue (certiorari), but as acquiescence in another (habeas)? Amicus provides no answer, and there is none.

Far from being irrational or duplicative as amicus claims (at 18), Congress's decision to provide this Court a choice of two methods by which to correct courts of appeals' errors in denying certificates was perfectly sensible. The two methods are effective for different purposes. Certiorari review of certificate denials is an efficient means of correcting significant legal errors and ensuring intercircuit uniformity in the application of the Section 2253 standard. It permits the Court to target a narrow legal error of national importance, without troubling itself with subsidiary legal and factual questions. And certiorari may be the *only* means of addressing certain questions, such as the procedures courts of appeals employ in deciding applications and the applicability of the certificate requirement to particular classes of habeas petitioners — issues that cannot appropriately be raised in an application to this Court for a certificate. See Br. 30-31. In contrast, the power of Circuit Justices to issue certificates of appealability implicates a different function: to ensure that justice is done in individual cases. This tool is suitable in cases in which the court of appeals' error in denying a certificate is not

[5] See, *e.g.*, 28 U.S.C. § 2241(a) (authorizing "the Supreme Court, any justice thereof, the district courts, and any circuit judge" to issue writs of habeas corpus); *id.* at § 2244(b) (authorizing second and successive habeas corpus petitions in certain circumstances); *id.* at § 1254(1) (authorizing certiorari review of cases in the courts of appeals).

particularly worthy of the full Court's attention, and entitlement to the certificate is a straightforward matter that is appropriately decided by a single Justice.

The application process is ill suited, however, as a vehicle for identifying and resolving important questions of law and ensuring uniformity among the circuits, as amicus would have it. This is so notwithstanding a single Justice's ability to refer an application to the full Court. First, applications for certificates generally emphasize the individual applicant's entitlement to relief, rather than the existence of circuit conflicts or the national importance of the issues. Compare S. Ct. Rules 10, 14.1(h) with S. Ct. Rule 22. Thus, the application process deprives the reviewing Justice of litigants' assistance in identifying legal issues worthy of the full Court's attention.[6] Second, an application is a poor means of targeting a single legal error for correction, since it requires resolution of all the questions predicate to issuance of a certificate, including factual and legal questions that the court of appeals may not have considered. In sum, Congress's design of Section 2253, which empowers the Court to exercise its discretion whether to issue a writ of certiorari or a certificate to correct a court of appeals' erroneous denial of leave to appeal, was sensible.

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[6] If Congress had intended decisions on certificate applications to serve the same error-correction and circuit-conflict-resolving functions as certiorari writs, as amicus claims, it almost certainly would have conferred the power to make such decisions on the full Court rather than on "circuit justices." While individual Justices of course have the power to refer applications to the full Court, they are not required to do so. See S. Ct. R. 22.5. And it is highly doubtful that a single Circuit Justice has the power to vacate a binding legal opinion of a full panel of a court of appeals, such as the one issued by the court below in this case, denying a certificate of appealability. See *Kimble* v. *Swackhamer*, 439 U.S. 1385 (1978) (Rehnquist, J., in chambers) ("It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits."); *Blodgett* v. *Campbell*, 508 U.S. 1301, 1303 (1993) (O'Connor, J., in chambers) (observing that a Circuit Justice appears to lack the power to "vacat[e] or reverse[] a court of appeals' order, other than an order providing interim relief").

2. A Ban Cannot Be Inferred From The Purposes Of The AEDPA

Amicus purports (at 17) to identify in Section 2253 a "jurisdiction stripping and case ending" policy that demonstrates that Congress intended to bar certiorari review. He explains (*ibid.*) that the denial of a certificate "both terminates the federal courts' power to review the matter and the inmate's power to seek review of the district court decision elsewhere."

But the manifest purpose of Section 2253 is to eliminate *frivolous* appeals, not to "terminate" all habeas cases in which certificates are denied. Section 2253 is *neither* "jurisdiction stripping" *nor* "case ending"; and amicus's assertion that denial of a certificate "terminates * * * the inmate's power to seek review" is contradicted by the plain language of the provision. As amicus himself points out repeatedly (at 27, 31, 36-37), Section 2253 expressly authorizes members of this Court to grant a certificate of appealability after one has been denied by the court of appeals. If a certificate is granted, the petitioner's appeal proceeds. The case is not terminated, and no court's jurisdiction has been stripped. Amicus also admits (at 14) that Section 2253 "leaves open" a second "door" to this Court's review for original petitions for habeas corpus. The availability of these avenues of review notwithstanding the denial of a certificate demonstrates that, while Section 2253 reflects a policy of "terminating" *frivolous* appeals, it also reflects a policy of ensuring review of meritorious claims.[7]

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[7] The legislative history of the AEDPA is replete with evidence of Congress's intent that habeas petitioners receive one full, fair review of their meritorious claims, including a full right to appeal. See, *e.g.*, *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the Sen. Comm. on the Judiciary*, 104th Cong. 3 (Mar. 28, 1995) (Statement of Sen. Hatch, Bill Co-Sponsor) (introducing "a bill that will guarantee prisoners one complete and fair course of collateral review in the Federal System"); 141 CONG. REC. S7481 (daily ed. May 25, 1995) (Statement of Sen. Hatch) ("There will be a full right of appeal all the way up the Federal courts, from Federal court to district court to the Supreme Court of the United States, and their rights will be protected."); H.R. REP. NO. 104-23, at 11 (1995) (noting that "the defendant would typically be accorded * * * review by the federal courts at the trial and appellate levels in federal habeas corpus proceedings, with a final opportunity to seek Supreme Court review at the end of the process").

3. Certiorari Jurisdiction Will Not Produce The Practical Difficulties Feared By Amicus

Next, amicus argues (at 18-19) that Congress could not have intended to tolerate this Court's continued exercise of certiorari jurisdiction because of the structural problem of "two-track * * * appellate review" that allegedly might ensue. According to amicus (at 18), it would be wasteful and disruptive if this Court had the power to issue a writ of certiorari to review a court of appeals' decision denying leave to appeal certain issues, in a case in which the court of appeals had granted a certificate of appealability as to other issues and those issues were being litigated below.

Amicus overlooks one indisputable fact: every one of the "administrative oddities" he posits *would occur (or not) to the same degree even if the Court lacked certiorari jurisdiction.* That is because an original application to the Supreme Court seeking a certificate on a denied issue presents precisely the same problem of two-track review. In fact, applications in this Court for certificates on denied issues present an even greater "problem of timing" (Am. Br. 18) than petitions for certiorari because, as amicus admits (at 40), "*[n]o* time restrictions curb [a petitioner's] authority to file" such an application.

In any event, should issue-splitting complications arise, the courts involved could take steps to ameliorate the problem. For example, this Court might choose to defer decision on timely petitions for certiorari until a decision is reached in the rest of the case. See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 244 (7th ed. 1993). Alternatively, courts of appeals might withhold judgment denying leave to appeal certain issues until they are able to dispose of the appealable issues on the merits. Cf. *Garrison* v. *Patterson*, 391 U.S. 464, 466 (1968) (courts of appeals may combine consideration of the certificate question with review of the merits).

II. SECTION 1254(1) CONFERS JURISDICTION TO REVIEW DENIALS OF LEAVE TO APPEAL

Amicus offers only a brief and unconvincing rejoinder to our detailed showing (Br. 11-26) that the plain language of Section 1254(1) confers certiorari jurisdiction in this case. The Solicitor General agrees (U.S. Br. 17-18), and amicus does not dispute (at 17), that an application for a certificate of appealability properly docketed in the circuit court of appeals is "*in* the court[] of appeals." They are wise to concede the point:

the application is "in" the court of appeals both in a physical sense — it is physically lodged and acted upon there (see 28 U.S.C. § 2253(c)) — and in the abstract sense that the court of appeals is jurisdictionally authorized to receive and decide it (see *ibid.*; *In re Burwell*, 350 U.S. 521 (1956); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982)).

Amicus instead suggests (at 17) that "it [is] awkward to think of" a certificate of appealability as being a "'case'" within the meaning of Section 1254(1). The sole explanation amicus provides for this perceived "awkward[ness]" is his unsupported assertion that "us[ing] the word 'case' in § 1254 to allow certiorari review of certificate applications asks too much of the operative words." *Ibid.* But we respectfully submit that the "operative words" are those comprising the definition of the word "case." As we have explained (Br. 18), "case" is and has always been, since enactment of the predecessor of Section 1254(1), defined broadly as "[a] general term" signifying "an action, cause, suit, or controversy, at law or in equity" (BLACK'S LAW DICTIONARY 175 (1891); BLACK'S LAW DICTIONARY 215 (6th ed. 1990)) — that is, "*any* proceeding judicial in its nature" (*ibid.* (emphasis added)). Surely there can be no debate that the "proceeding" below was "judicial in its nature"; nor indeed, does either amicus or the government contend otherwise. In short, there is nothing awkward about recognizing that the Eighth Circuit's extensive proceedings and decision below were part of a "case" in the court of appeals.

Faced with the generous grant of jurisdiction expressed in Section 1254, amicus turns instead to "[l]ongstanding [p]recedent" (Am. Br. 21) to buttress his argument against statutory certiorari jurisdiction. That precedent consists chiefly of this Court's two-sentence holding on statutory certiorari in *House* and the similarly cursory statements (*e.g.*, *Ferguson* v. *District of Columbia*, 270 U.S. 633 (1926) (per curiam); *In re 620 Church Street Bldg. Corp.*, 299 U.S. 24, 26 (1936)) upon which *House* was premised. The Solicitor General too, while suggesting that the language and logic of Section 1254(1), and many of this Court's more recent decisions, compel the conclusion that a decision to deny a certificate is a "case[] in the court of appeals" (U.S. Br. 16-21, 23-26), nevertheless laments (*id.* at 26) that *House* and stare decisis bar this Court from reaching that correct result.

But "'this Court has never felt constrained to follow precedent'" when "governing decisions are unworkable or are badly reasoned" (*Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith* v.

Allwright, 321 U.S. 649, 665 (1944))). And the principle of stare decisis is especially weak when the "underpinnings" of the decisions have been "eroded[] by subsequent decisions of this Court." *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). The statutory certiorari decision of *House* meets each of these criteria warranting its disavowal. It is "badly reasoned": it simply assumes, without explanation, that because the *appeal* from the denial of habeas relief is not "in" the court of appeals unless and until a certificate is issued, the request for a certificate must not be either. But that is a position that not even the court-appointed amicus endorses in this case: none of the parties here disputes that an application for a certificate *is* "*in* the court of appeals." See Am. Br. 17 (acknowledging that "it might be argued that Mr. Hohn's *application* for a certificate came into the court of appeals") (emphasis in original); U.S. Br. 17-18. And the *House* Court made not the slightest mention of any of the textual and other arguments we have presented here.[8]

House's perfunctory reasoning also has been severely undermined by this Court's more recent — and more reasoned — decision in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982). In that case, the Court held that "[t]here can be no serious doubt" about its power under Section 1254(1) "to review a court of appeals' decision to dismiss for lack of jurisdiction." *Id.* at 743 & n.23.

A court of appeals' certificate decision declining to accept jurisdiction over an appeal under Section 2253 is, as the Solicitor General acknowledges (U.S. Br. 20), "functionally equivalent" to a decision dismissing an appeal for lack of jurisdiction, which this Court held in *Nixon* is reviewable on a statutory writ of certiorari. The Solicitor General weakly suggests (*ibid.*), however, that "a distinction * * * in form" between the two situations — the fact that in Section 2253 Congress "has established a two-stage procedure" formally severing the predicate jurisdictional decision from the appeal — "may justify" a different rule regarding reviewability. But it is difficult to see why. As

[8] The question of statutory certiorari jurisdiction was neither briefed nor argued in *House*. The Court decided the jurisdictional question on the basis of a petition for certiorari filed by House's mother, which merely invoked statutory certiorari as the basis for jurisdiction, with little relevant explication. No opposition to the petition was filed by the State of Florida. See Pet. for Cert. and Letter from Charles E. Cropley, Clerk of Supreme Court, to Hon. J. Tom Watson, Attorney General of Florida (Feb. 7, 1945).

the Solicitor General himself points out, the fact that a judicial proceeding in the court of appeals is completely severed from consideration of the "merits" has never disqualified that proceeding from the status of a "case" in the court of appeals or insulated it from this Court's statutory certiorari review. See U.S. Br. 18-20 (citing interlocutory review and mandamus cases); see also Br. 21-23. If anything, the fact that a certificate proceeding is required by statute to occur before and separate from the merits appeal *confirms* that it is an independent case in the court of appeals. In contrast, when the jurisdictional decision is *not* statutorily severed from the merits appeal, there may be an argument that the jurisdictional decision is somehow "with" the merits appeal, which has been statutorily barred from entering the court of appeals.

Amicus strives to diminish the significance of the *Nixon* cases by asserting that they "*merely* teach that the Court has power to assess its own jurisdiction." Am. Br. 28 (emphasis added). That is incorrect. *Nixon* v. *Fitzgerald* squarely held that this Court has *statutory certiorari* power to review a *court of appeals*' disavowal of jurisdiction. 457 U.S. at 743 & n.23. That decision is simply irreconcilable with the holding of *House* that a court of appeals' decision improperly declining jurisdiction is unreviewable on statutory writ of certiorari.[9] In addition, the *Nixon* cases held that this Court's statutory certiorari power extends to the *merits* of any appeal over which the court of appeals could properly have exercised its jurisdiction, regardless whether it chose to do so. *Nixon* v. *Fitzgerald*, 457 U.S. at 743 & n.23; *United States* v. *Nixon*, 418 U.S. 683, 690 (1974). Together, the *Nixon* cases establish that any legal issue over which the court of appeals *could* properly have exercised its jurisdiction — whether it is a predicate jurisdictional decision over which every court

[9] Amicus also attempts (at 27-28) to distinguish the *Nixon* cases on the ground that the final judgment rule at issue there reflects a congressional policy merely to regulate when an appeal is taken, while Section 2253 purportedly reflects a congressional policy to "terminat[e] [an appeal] altogether." Putting aside amicus's incorrect characterization of the purpose underlying Section 2253 (see pp. 6-7, *supra*), this is a distinction without a difference. Both the final judgment rule and Section 2253 require courts of appeals to decline jurisdiction over certain appeals. There is simply no reason that a jurisdictional decision interpreting the final judgment rule to mandate dismissal of an attempted appeal would be subject to this Court's review under Section 1254(1), while a jurisdictional decision interpreting Section 2253 to require the same thing would not.

of appeals always has jurisdiction or a merits appeal — is "in the court[] of appeals" and subject to this Court's statutory certiorari jurisdiction, notwithstanding any decision by the court of appeals to the contrary.

Finally, the *House* holding concerning statutory certiorari jurisdiction should be overruled because it creates an unnecessarily complex jurisdictional rule. *House* creates a senseless exception to the simple, straightforward rule that this Court has the power to review by statutory writ of certiorari *all* judicial proceedings in the courts of appeals. Indeed, if reaffirmed, the *House* holding would call into doubt the Court's statutory certiorari power to review a host of proceedings in the courts of appeals — such as proceedings on petitions for mandamus, stay applications and interlocutory appeals of single issues pursuant to 28 U.S.C. § 1292(b) — that, like proceedings on a certificate application, occur before and independent of a "merits" appeal.

III. THE ALL WRITS ACT CONFERS JURISDICTION TO REVIEW DENIALS OF LEAVE TO APPEAL

The expansive terms of the All Writs Act, authorizing the Court to issue a common-law writ of certiorari whenever it is "necessary or appropriate in aid of" its jurisdiction and "agreeable to the usages and principles of law" (28 U.S.C. § 1651), empower the Court to review the decision below. If the Court concludes that it lacks statutory certiorari jurisdiction, issuance of a common-law writ would be both reasonably "necessary" *and* "appropriate" to protect the Court's jurisdiction over the pretermitted appeal, to correct the error of the court below efficiently and directly, and to ensure uniformity among the circuits in applying Section 2253.

Stymied by the generous language of the All Writs Act, amicus endeavors to insert into the statute jurisdictional requirements that Congress has not adopted. First, he contends that the All Writs Act restricts availability of the writ solely to circumstances in which its issuance is "necessary." Am. Br. 5 (arguing that "the 'extraordinary writ' has always required at a minimum some form of necessity"); *id.* at 13, 31. But the plain language of the All Writs Act contradicts that reading. The Act authorizes the Court to issue a common-law writ whenever it is "necessary *or appropriate*" in aid of the Court's appellate jurisdiction,

using the terms in the disjunctive. 28 U.S.C. § 1651 (emphasis added).[10]

Relatedly, amicus urges (at 12-13, 19-20, 30-31, 35-37) that the writ is unavailable if the petitioner has any "alternative means" of obtaining relief. But the language of the statute includes no such restriction on the Court's power, and the Court accordingly often issues common-law certiorari writs notwithstanding the existence of alternative remedies. In *Alkali* and *DeBeers*, for example, the Court issued common-law writs of certiorari to review an interlocutory order and a preliminary injunction, respectively, despite the possibility of (and legislatively expressed preference for) review of a final judgment. The availability of the remedy of an original petition in this Court for habeas corpus (see 28 U.S.C. § 451 (1940)) similarly failed to deter the Court from holding that

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[10] *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34 (1985), is not to the contrary. There, the Court held only that the mere fact that issuance of a writ would be "appropriate" in aid of the Court's jurisdiction is insufficient; it must also be true that the writ does not contravene an express legislative directive to preclude the exercise of jurisdiction under the All Writs Act. See *id.* at 41-43.

Indeed, the Court interpreted its All Writs Act power as authorizing it to grant writs that were merely "appropriate," rather than necessary, even before the word "appropriate" appeared in the Act. As the Solicitor General explains (U.S. Br. 32 n.21), Congress added the words "*or appropriate*" to the All Writs Act in 1948 to codify the Court's broad interpretation of its common-law certiorari power in *Alkali Export Ass'n* v. *United States*, 325 U.S. 196 (1945), and *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945). See H.R. REP. NO. 80-308, at A145 (1947). In each of those cases, the Court had held that the All Writs Act empowered it to issue a writ notwithstanding both the availability of, and Congress's strong legislatively expressed preference for, another method of Supreme Court review (appeal from a final judgment). The Court explained in each case that issuance of the writ was "*appropriate*" notwithstanding the existence of an alternative remedy. *Alkali*, 325 U.S. at 204 (emphasis added); *De Beers*, 325 U.S. at 217 (emphasis added). Amicus's effort (at 33) to limit the application of *Alkali* and *De Beers* to situations in which a lower court has *exceeded* its jurisdiction, as opposed to declining improperly to exercise the jurisdiction with which it is vested (as in denials of leave to appeal), is unpersuasive. As Justice Stevens has explained, that argument is premised upon the "entirely unwarranted assumption" that those decisions, "decided only a few weeks after *House*, implicitly overruled that case." *Davis*, 454 U.S. at 913 n.1 (opinion of Stevens, J.).

it had jurisdiction to issue a common-law writ of certiorari in *House*.[11]

Issuance of the writ to review denials of leave to appeal is both necessary *and* appropriate in aid of the Court's appellate jurisdiction in this case, despite the Court's power to issue a certificate of appealability or a writ of habeas corpus on an original petition. As we explained above (in Section I) and in our opening brief (at 30-31), certificate decisions and writs of habeas corpus on original petitions are indirect, cumbersome, and inadequate tools for this Court's performance of its appellate function.[12]

Second, amicus repackages his argument that Section 2253 contains a silent statutory repeal of certiorari jurisdiction as an argument under Section 1651. He suggests (at 32-33) that the All Writs Act confers no jurisdiction if another statute even touches upon the situation that gives rise in a particular case to the need for a writ. To the contrary, another statute forecloses All Writs Act jurisdiction only when it actually evinces

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[11] Amicus's reliance (at 31) on this Court's prudential requirement "that adequate relief cannot be obtained in any other form or from any other court" (S. Ct. R. 20) is misplaced. The Court's Rule makes clear that the absence of another adequate remedy is merely a prerequisite to its "sparing[] exercise[]" of *discretion* to grant extraordinary writs — not a condition of the Court's *power* to act, which under the All Writs Act is plenary. See, *e.g.*, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943) ("the question * * * is not whether the court * * * had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power"). In any event, neither of the available alternatives is adequate, as we next explain.

[12] If the Court concurs in the Solicitor General's argument that this Court cannot grant a certificate except upon a "clear and indisputable" "substantial showing" of entitlement, and that Hohn's showing falls short of that heightened standard, then issuance of an extraordinary writ indisputably would be both necessary and appropriate here. See U.S. Mem. in Opp. to Hohn's Protective Application for a Certificate of Appealability at 2 (1/29/98). In that circumstance, literally no relief other than an extraordinary writ would be available. But, as we explain in our reply to that paper (filed 2/24/98), the Solicitor General's suggestion that the Court should impose such a heightened threshold showing contravenes the express language of Section 2253, which mandates that a certificate be issued upon only a "*substantial showing* of the denial of a constitutional right." 28 U.S.C. § 2253 (emphasis added).

a legislative intent to preclude such review.[13] See *Alkali*, 325 U.S. at 203 (review by "extraordinary writ is not permissible in the *face of [a] plain indication of [a] legislative purpose to avoid [such] review[]*") (emphasis added); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 172-173 (1977) ("[u]nless * * * confined by Congress, a federal court may avail itself of all auxiliary writs"). The question is a straightforward one of statutory interpretation: Did Congress, by adopting a "statute specifically address[ing] the particular issue at hand," eliminate certiorari jurisdiction it elsewhere has granted?

As we explained above, Section 2253 does not explicitly or impliedly bar the Court from exercising certiorari jurisdiction. Nor does the mere fact that Section 2253 makes available another, very different avenue for relief — an original application to a Circuit Justice for a certificate — suggest any "legislative purpose to avoid [certiorari] review[]." *Alkali*, 325 U.S. at 203. As we explained above, the two remedies are complementary, serving different functions. Section 2253, combined with Section 1651, suggests a congressional intent to give the Court a choice of methods for addressing circuit court errors in denying leave to appeal: a discretionary, full review to resolve legal issues of national importance; and a mandatory, fact-intensive "safety valve" to ensure individual justice even if no issues of national importance are presented.

Finally, amicus attempts to dismiss this Court's holding in *House* that it has the power to issue a common-law writ of certiorari on the theory that, at the time *House* was decided, Justices of the Court lacked jurisdiction to employ the "alternative" remedy of issuing a certificate.

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[13] Amicus errs in relying on *Carlisle* v. *United States*, 116 S. Ct. 1460 (1996) and *Marshals*, 474 U.S. at 42. In both cases, unlike the case at bar, petitioner sought a writ that would contravene an express statutory mandate. In *Carlisle*, the Court declined to issue an extraordinary writ to avoid a time limit imposed by the Federal Rules of Criminal Procedure. 116 S. Ct. at 1466. In *Marshals*, the Court refused to issue an extraordinary writ to compel federal marshals to produce a prisoner in the face of a statute that "expressly commands" that the writ "'*shall be directed to the person having custody* of the person detained,'" not to the federal marshals. 474 U.S. at 38-39 & n.4 (quoting 28 U.S.C. § 2243) (emphasis added). In contrast, as we explain above in Section I, neither Section 2253 nor any other statute contains any such express statutory command that would be undermined by issuance of an extraordinary writ here.

Am. Br. 13, 36-37. An extraordinary writ therefore was the only, and hence the appropriate, mechanism available to the Court for preventing the untimely demise of an appeal, amicus claims. He further argues that Congress rectified this situation in 1948, when it added the word "circuit justice" to Section 2253, thereby expressly authorizing the Justices of this Court for the first time to remedy erroneous denials of leave to appeal by the courts of appeals.

As the Solicitor General has explained (U.S. Reply 5-8), the problem with this argument is that its premise — that Justices of the Supreme Court lacked the power to issue certificates in 1945, when *House* was decided — is false. In 1945, the predecessor of Section 2253 conferred the power to issue a certificate of probable cause on "the United States court by which the final decision was rendered or a *judge of the circuit court of appeals.*" 28 U.S.C. § 466 (1940) (emphasis added). True, the word "justice" did not appear in that provision. But the term "judge of the circuit court of appeals" was defined by *another* statutory provision in Title 28 *to include the Justices of the Supreme Court in their capacity as Circuit Justices.*[14] That Congress had understood its reference in the certificate provision to "judges of the circuit court of appeals" to include Circuit Justices before the 1948 amendments is confirmed by its characterization of the 1948 amendments, which added the words "circuit justice," as an inconsequential "change[] * * * in phraseology." H.R. REP. NO. 80-308, at A180 (1947). See also BLACK'S LAW DICTIONARY 841 (6th ed. 1990) ("'Judge,' 'justice,' and 'court' are often used synonymously or interchangeably.").

Indeed, if amicus were correct in his assertion that the 1940 statute's reference to circuit judges excluded Justices of this Court, then the Justices may *still* lack the power to issue certificates. Federal Rule of Appellate Procedure 22(b) as amended by the AEPDA, like the 1940 version of Section 2253, confers the power to issue certificates upon "a district or a circuit judge," but not upon "circuit justices." Fed. R. App. P. 22(b) ("an appeal by the applicant for the writ may not proceed unless

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[14] Section 217 of Title 28 of the United States Code stated in 1940:

> The words "circuit justice" and "justice of a circuit" shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge", when applied generally to any circuit, shall be understood to include such justice.

a *district or a circuit judge* issues a certificate of appealability") (emphasis added).

IV. THE ARGUMENT THAT SECTION 2253 POSES NO BAR TO JURISDICTION IN THIS CASE IS DIRECTLY RESPONSIVE TO THE QUESTION PRESENTED

Hohn argued in his merits brief that this Court has jurisdiction to grant, vacate, and remand the case despite the court of appeals' denial of a certificate, because the certificate requirement is inapplicable to him. He explained that, because Section 2253 does not apply retroactively to cases that were filed in the district court before the effective date of the AEDPA, his case was properly in the court of appeals upon his timely filing of his notice of appeal; and no statutory bar exists to this Court's certiorari jurisdiction.

Amicus and the government endeavor to dismiss this point on the procedural ground that Hohn did not raise it in his petition. But this case is not limited to one or any of the questions presented in Hohn's petition; instead, it involves a question of the Court's own creation. Hohn's argument is directly responsive to the Court's question.[15] If Section 2253 is not retroactive as to Hohn, the denial of a certificate pursuant to Section 2253 presents no bar to this Court's "jurisdiction to grant certiorari, vacate, and remand this case" to the court of appeals. J.A. 50. In any event, the question whether Section 2253 is retroactive to Hohn is jurisdictional; and jurisdictional issues may always be considered, whether or not raised in the petition for certiorari or below. See, *e.g.*, *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 197 (1956).[16]

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[15] Because the Court formed its own question, both parties received notice of the question at the same time. Compare *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (holding that one purpose of S. Ct. Rule 14.1(a) is to ensure that respondent receives "notice of the grounds upon which the petitioner is seeking certiorari"). Indeed, it was the Solicitor General who first raised the issue of *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997) (which was decided after Hohn filed his petition for certiorari) in his brief in response to Hohn's petition. Petitioner then argued in his reply that *Lindh* provided yet another reason why a grant of certiorari would be appropriate.

[16] Even if the non-retroactivity issue were not fairly included in the jurisdictional question the Court has posed, it would still be appropriate for the Court to reach it. The Court's intervening decision in *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2068 (1997), effected a substantial change in controlling law

The government's effort to distinguish the Court's recent holding that the amendments to Chapter 153 of the AEDPA apply "only to cases filed after the Act became effective" (*Lindh* v. *Murphy*, 117 S. Ct. 2059, 2068 (1997)) is unpersuasive. Tellingly, the government makes *no* argument that Congress evinced any intent that Section 2253(c) should be treated differently from the other amendments to Chapter 153, which this Court held in *Lindh*, as a matter of statutory construction, do not apply to cases filed before the date of enactment. Nor could it: the same "negative implication" that compelled the conclusion that Congress did not intend for the amendments to Chapter 153 to apply to cases filed before the date of the AEDPA is equally applicable to Section 2253(c), which was created by one of those amendments. Instead, the Solicitor General simply reiterates the arguments grounded in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), that the statute's terms would not produce a retroactive effect. But the *Lindh* majority rejected the *Landgraf* analysis as inapposite where, as here, it is possible to discern from the language of the statute and ordinary rules of statutory construction Congress's intent that a statute not apply retroactively. 117 S. Ct. at 2063.[17]

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and is an extraordinary circumstance that warrants an exception to the general rule. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n.7 (1984); *Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 176 (1985); *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 n.6 (1980). See also *Blonder-Tongue Labs., Inc.* v. *University of Illinois Found.*, 402 U.S. 313, 320-321 & n.6 (1971). Before *Lindh*, every circuit to have addressed the issue had held that Section 2253 was retroactive to cases that were pending in the district court, but were not yet pending in the court of appeals. *E.g.*, *Lozada* v. *United States*, 107 F.3d 1011, 1012-1013 (2d Cir. 1997); *Santana* v. *United States*, 98 F.3d 752 (3d Cir. 1996); *United States* v. *Orozco*, 103 F.3d 389, 392 (5th Cir. 1996); *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1075 (6th Cir. 1997); *United States* v. *Riddick*, 104 F.3d 1239, 1241 (10th Cir. 1997); *Hunter* v. *United States*, 101 F.3d 1565, 1567 (11th Cir. 1996) (en banc).

[17] Finally, Hohn did not "waive" his application for a certificate of appealability by failing to raise it in his petition, as amicus asserts (at 39-40). It is this Court's practice, upon denying a petition for certiorari to review a court of appeals' denial of a certificate of appealability, to consider *sua sponte* whether to issue a certificate, even when the petitioner has not requested one. See *Davis*, 454 U.S. at 913-915 (opinion of Stevens, J.); see also *id.* at 918 (Rehnquist, J., Burger, C.J. & Powell, J., dissenting). Hohn nonetheless filed a protective application for a certificate, alerting the Court of his intent to file the application and requesting its consideration in his brief on the merits. Br. 44-49 & n.34.

CONCLUSION

This Court should vacate the decision below and remand per the suggestion of the Solicitor General. In the alternative, the Court should either vacate and remand with instructions to consider Hohn's appeal, or grant Hohn a certificate of appealability.

Respectfully submitted.

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FEBRUARY 1998